

## **Limited Oversight: Legislative Access to Intelligence Information in the United States and Canada**

Kathleen Clark<sup>1</sup> and Nino Lomjaria<sup>2</sup>

### *Introduction*

- I. *United States Congress's Access to Intelligence Information*
    - A. *Members of Congress*
    - B. *Members' Staff*
    - C. *Congress's Indirect Servants: Government Accountability Office and Inspectors General*
  - II. *Canadian Parliament's Access to Intelligence Information*
    - A. *Parliamentary Members and Offices*
    - B. *Non-Parliamentary Offices that Review Intelligence Activities*
      1. *SIRC and IG Review of the CSIS*
      2. *Commissioner Review of the CSE*
      3. *CPC Review of RCMP*
    - C. *Ad hoc Inquiries regarding Intelligence Abuses*
- Conclusion*

### **Introduction**

In theory, legislatures can perform critical oversight functions regarding nearly all government agencies if they have access to information about those activities. Legislators gain access to information in several different ways: directly when information is provided to the legislators themselves; or indirectly when the information is provided to their staff members, to legislative offices that conduct studies for the

---

<sup>1</sup>John S. Lehmann Research Professor of Law, Washington University in St. Louis. kathleen@wustl.edu. Some passages in this paper are based on my previous publications: *Congress's Right to Counsel in Intelligence Oversight*, 2011 U. ILL. L. REV. 915; *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Program*, 2010 B.Y.U. L. REV. 357. I am grateful to Craig Forcese, Kent Roach and Steve Jackson for their comments on an earlier version of this article and to the participants in the Workshop on Secrecy, National Security, and the Vindication of Constitutional Law at Bocconi University, Milan.

<sup>2</sup>L.L.M. Washington University in St. Louis (2011) and Edmund Muskie Fellow (2010-11).

legislature, or to non-legislative offices that report to the legislature. After scandals about intelligence abuses erupted in the mid-1970s, the U.S. Congress increased its access to intelligence information from direct access by a few legislators to expanded access through these methods as well. The Canadian Parliament generally obtains information about intelligence activities only when non-legislative offices provide it with reports, and those reports generally are stripped of any classified information. As a result, Canadian parliamentarians have generally had no more access to intelligence information than the Canadian public at large, limiting their ability to assess and control the government's intelligence activities.

## I. United States Congress's Access to Intelligence Information

### A. Members of Congress

Congress performs most of its work through its committees.<sup>3</sup> Until the mid-1970s, congressional oversight of intelligence was handled by intelligence subcommittees of the House and Senate Armed Services and Appropriations Committees.<sup>4</sup> Their oversight was quite lax.<sup>5</sup> The

---

3. See WOODROW WILSON, CONGRESSIONAL GOVERNMENT 79 (1885) ("Congress in its committee-rooms is Congress at work.").

4. L. BRITT SNIDER, CENTRAL INTELLIGENCE AGENCY, CSI 97-10001, SHARING SECRETS WITH LAWMAKERS: CONGRESS AS A USER OF INTELLIGENCE 1 (1997) (noting that the armed services and appropriations committees had subcommittees "responsible for the CIA"). In 1974, the House Foreign Affairs Committee gained some oversight authority "for intelligence activities relating to foreign policy." Frederick M. Kaiser, *Congress and the Intelligence Community: Taking the Road Less Traveled*, in THE POSTREFORM CONGRESS 279, 281 (Roger H. Davidson ed., 1992); see also CECIL V. CRABB, JR. & PAT M. HOLT, INVITATION TO STRUGGLE: CONGRESS, THE PRESIDENT AND FOREIGN POLICY 140 (1980). But see STEPHEN F. KNOTT, SECRET AND SANCTIONED: COVERT OPERATIONS AND THE AMERICAN PRESIDENCY 163 (1996) ("[B]y 1967, seventeen committees received detailed information on the [CIA]'s activities."). For a discussion of the failed attempts of Senators Mike Mansfield and Eugene McCarthy to create a committee dedicated to intelligence oversight, see CRABB & HOLT, *supra*, at 141–42, 144.

5. CRABB & HOLT, *supra*, at 137 ("For more than 25 years following passage of the National Security Act . . . in 1947, Congress largely ignored the intelligence community."); FRANK J. SMIST, JR., CONGRESS OVERSEES THE UNITED STATES INTELLIGENCE COMMUNITY 1947–1994, at 4 (2d ed. 1994). Smist refers to this lax oversight approach as "institutional oversight." *Id.* at 19–24. Other analysts refer to it as "undersight." William E. Conner, *Congressional Reform of Covert Action Oversight Following the Iran-Contra Affair*, 2 DEF. INTELLIGENCE J. 35, 40 (1993); see also L. BRITT SNIDER, THE AGENCY AND THE HILL: CIA'S RELATIONSHIP WITH CONGRESS, 1946–

subcommittees had only minimal staff, and the intelligence agencies provided oral (rather than written) briefings.<sup>6</sup> In the Senate, only one staff member was allowed to attend the briefings.<sup>7</sup> The members of Congress who chaired the intelligence subcommittees apparently saw themselves as allies (rather than adversaries) of the intelligence agencies, and saw no need for additional staff resources or more formal oversight mechanisms.<sup>8</sup>

This arrangement changed in the mid-1970s, amid public revelations of intelligence agency abuses. In December 1974, Congress

---

2004, at 55 (2008) (hereinafter SNIDER, *THE AGENCY AND THE HILL*) (describing congressional oversight before the mid-1970s as “ad hoc and informal”). Some refer to it as “overlook instead of oversight.” Loch K. Johnson, *Playing Hardball with the CIA, in THE PRESIDENT, THE CONGRESS, AND THE MAKING OF FOREIGN POLICY* 49, 53 (Paul E. Peterson ed., 1994). Still others refer to it as “minimal.” Kaiser, *supra* at 279, 280 (quoting Senator Leverett Saltonstall, a member of two intelligence subcommittees, referring to congressional “reluctance . . . to seek information and knowledge on subjects which [he] personally, as a member of Congress and as a citizen, would rather not have”).

During this era, Congress engaged in intelligence oversight only in response to intelligence failures so large that they reached the newspapers, such as the Soviets’ shooting down the U-2 plane and the failed invasion of Cuba at the Bay of Pigs. CRABB & HOLT, *supra*, at 137–38, 142–43; Loch K. Johnson, *Accountability and America’s Secret Foreign Policy: Keeping a Legislative Eye on the Central Intelligence Agency*, 1 FOREIGN POL’Y ANALYSIS 99, 103 (2005) [hereinafter Johnson, *Accountability*] (contrasting Congress’s energetic responses to scandals affecting the intelligence community with its more lax routine oversight).

6. SNIDER, *THE AGENCY AND THE HILL*, *supra* at 306 (2008) (“[T]he lack of a professional staff capable of independently probing and assessing what the Agency was being directed to do . . . hampered the CIA subcommittees.”).

7. CRABB & HOLT, *supra*, at 141 (“Only one staff member—the much overworked staff director of the Senate Armed Services Committee—was permitted to attend the meetings, and he was forbidden to brief any other senators on what transpired.”).

8. Senator Richard Russell, who chaired the CIA subcommittees of *both* the Armed Services and Appropriations Committees, wrote:

It is difficult for me to foresee that increased staff scrutiny of CIA operations would result in either substantial savings or a significant increase in available intelligence information. . . . If there is one agency of the government in which we must take some matters on faith, without a constant examination of its methods and sources, I believe this agency is the CIA.

*Id.* at 6 (quoting Letter from Senator Richard Russell, Chairman, CIA Subcomm. of Armed Servs., to Senator Theodore Green, Chairman, Comm. Rules & Admin. (Jan. 16, 1956) (on file with the Dr. Frank J. Smist, Jr. Collection of the University of Oklahoma)).

passed the Hughes-Ryan Amendment, formalizing the regulation of covert actions, which are currently defined as government activities intended “to influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly.”<sup>9</sup> The Hughes-Ryan Amendment required that any covert action be supported by a presidential finding that the action was “important to the national security” and that the President report “in a timely fashion, a description and scope of such [actions] to the appropriate committees of the Congress.”<sup>10</sup> While the statute did not spell out which were the “appropriate committees,” that phrase was understood to include the House and Senate Foreign Relations, Armed Services and Appropriations Committees. Together, these committees had more than 160 members.<sup>11</sup>

That same month, Seymour Hersh started publishing a series of newspaper articles detailing extensive illegal activity by intelligence agencies.<sup>12</sup> Hersh’s articles led to the creation of ad hoc investigative committees in the Senate (colloquially known as the “Church Committee” for its chair, Senator Frank Church) and the House (known as the “Pike Committee” for its chair, Representative Otis Pike).<sup>13</sup> These

---

9. 50 U.S.C. § 413b(e) (2006). Congress enacted this statutory definition of covert action in 1991. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602 § 503(e), 105 Stat. 441, 443. The statutory definition of covert activities specifically excludes “activities the primary purpose of which is to acquire intelligence.” *Id.* The Hughes-Ryan Amendment did not use the phrase, “covert action,” and instead referred to “operations in foreign countries, other than activities intended solely for obtaining necessary intelligence.” Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 32, 88 Stat. 1795, 1804 (codified at 22 U.S.C. § 2422). In the Intelligence Authorization Act for Fiscal Year 1981, Congress used an additional phrase to refer to covert actions: “a significant anticipated intelligence activity.” Pub. L. No. 96-450, § 407(a)(2), 94 Stat. 1975, 1981 (1980) (amending 22 U.S.C. § 2422).

10. Foreign Assistance Act § 32, 88 Stat. at 1804; *see* Conner, at 41.

11. KNOTT, *supra*, at 166.

12. Seymour M. Hersh, *Huge C.I.A. Operation Reported in U.S. Against Antiwar Forces, Other Dissidents in Nixon Years*, N.Y. TIMES, Dec. 22, 1974, at 1; *see also* Cynthia M. Nolan, *Seymour Hersh’s Impact on the CIA*, 12 INT’L J. INTELLIGENCE & COUNTERINTELLIGENCE 18, 20–21 (1999).

13. SMIST, *supra*, at 9–10 (describing the creation of the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities and the House Select Intelligence Committee). In February 1975, the House created a committee

committees hired large staffs, including lawyers and investigators; held hearings; and wrote lengthy reports revealing widespread illegal activities by the intelligence agencies.<sup>14</sup> Among their recommendations was a call for enhanced congressional oversight of the intelligence community.

In May 1976, less than a month after the Church Committee issued its final report, the Senate created the Senate Select Committee on Intelligence and passed a nonbinding resolution that department heads should keep that committee “fully and currently informed” of the agency’s intelligence activities.<sup>15</sup> The following year, the House created its own intelligence committee.<sup>16</sup> President Carter partially endorsed the Senate resolution by issuing an executive order requiring intelligence agencies to keep the intelligence committees “fully and currently informed” of their activities,<sup>17</sup> but that order also included limiting language that could justify nondisclosure of sensitive information—indicating that such reporting must be undertaken “consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods.”<sup>18</sup> In 1980, Congress codified the

---

chaired by Representative Lucien Nedzi, but that committee was beset by internal squabbling. In June of the same year, Representative Nedzi resigned as chair. In July, the House abolished the initial committee and created a new one with the same name but chaired by Representative Pike. CRABB & HOLT, *supra*, at 150.

14. The Church Committee issued seventeen volumes of reports and hearings. CRABB & HOLT, *supra*, at 149; see S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, S. REP. NO. 94-755 (1976). The Pike Committee issued recommendations. HOUSE SELECT COMM. ON INTELLIGENCE, 94TH CONG., RECOMMENDATIONS OF THE FINAL REPORT OF THE HOUSE SELECT COMMITTEE ON INTELLIGENCE, H.R. Rep. No. 94-833 (1976). But the report on its findings was not officially published because the House of Representatives voted against its issuance. See *infra* text accompanying notes 212–13.

15. S. Res. 400, 94th Cong. § 11(a) (1976) (as amended); CRABB & HOLT, *supra*, at 152–53.

16. H.R. Res. 658, 95th Cong. (1977) (enacted). The House Resolution did not purport to require intelligence agencies to keep the House Intelligence Committee “fully and currently informed.” Kaiser, *supra*, at 288.

17. Exec. Order No. 12,036, § 3-401, 3 C.F.R. 112, 132 (1979).

18. *Id.* § 3-4, 3 C.F.R. at 132.

requirement that the executive branch keep the intelligence committees “fully and currently informed” of intelligence activities (including covert actions),<sup>19</sup> but it also included limiting language similar to that in Carter’s executive order.<sup>20</sup> This additional language raises the possibility that the executive branch can withhold information about intelligence activities from the intelligence committees.<sup>21</sup> But another provision of

---

19. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, sec. 407(b)(1), § 501(a), 94 Stat. 1975, 1981 (1980) (known as the Intelligence Oversight Act of 1980) (codified as amended at 50 U.S.C. § 413(a)). The Act required intelligence agency heads to keep the intelligence committees fully and currently informed

[t]o the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods.

*Id.* In 1991, Congress amended this statute to impose the requirement to keep the intelligence committees “fully and currently informed” on the President as well. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, § 501(a)(1), 105 Stat. 429, 441 (codified as amended at 50 U.S.C. § 413(a)). For a visual representation of how several of the congressional intelligence oversight statutes have evolved over time, see AS THE CODE CHANGES, <http://asthecodechanges.wustl.edu>.

20. The statute imposed the reporting obligation

[t]o the extent consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches of the Government, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods.

50 U.S.C. § 413(a) (1988) (amended 1991). The Senate Report accompanying this legislation “recognized that in extremely rare circumstances a need to preserve essential secrecy may result in a decision not to impart certain sensitive aspects of operations or collection programs to the oversight committees in order to protect extremely sensitive intelligence sources and methods.” S. REP. NO. 96-730, at 6 (1980).

21. As Congress was considering this legislation, the CIA General Counsel set forth the executive branch’s understanding that this limiting language permits the President not to make disclosures “in the exercise of his constitutional authority or in rare circumstances” to protect intelligence sources and methods. Conner, *supra*, at 43–44. In 2006, the Bush administration argued that this same provision justified its limited disclosures to Congress. Letter from William E. Moschella, Assistant Attorney Gen., to Senator Arlen Specter, Chairman, Comm. on the Judiciary 8 (Feb. 3, 2006), <http://www.usdoj.gov/ag/readingroom/surveillance17.pdf> (arguing that this provision “gives the [e]xecutive [b]ranch flexibility to brief only certain members of the

the same statute asserts that “[n]othing in this Act shall be construed as authority to withhold information from the congressional intelligence committees on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.”<sup>22</sup>

Ambiguity about the extent of Congress’s right to intelligence information can be found not just in these early enactments, but also in later statutes in this field. When Congress re-codified the duties of the Director of Central Intelligence (DCI) in 1992, it set out in statute a requirement that the DCI “provid[e] national intelligence” to Congress.<sup>23</sup> But the requirement that Congress imposed with one hand it took away with another, indicating that this requirement applied only “where appropriate,” a term that Congress made no effort to define.<sup>24</sup> When Congress reorganized the intelligence community in 2003, creating the office of Director of National Intelligence (DNI), it required the DNI to “ensur[e] that national intelligence is provided” to Congress, and omitted the “where appropriate” language.<sup>25</sup> Yet the effect of this new statute is unclear, for it does not purport to mandate that the DNI share all national intelligence with Congress. Like the earlier version, this statutory mandate for information disclosure leaves substantial discretion in the hands of the executive branch to determine which information to disclose. On the other hand, Congress passed legislation in 2010 requiring the executive branch to provide the intelligence committees with “the legal basis under which . . . intelligence activit[ies are] being . .

---

intelligence committees where more widespread briefings would pose an unacceptable risk to the national security”).

22. 50 U.S.C. § 413(e) (2006) (emphasis added).

23. Intelligence Authorization Act for Fiscal Year 1993, Pub. L. No. 102-496, sec. 705, § 103(a), 106 Stat. 3180, 3190–91 (1992).

24. *Id.*; see also SNIDER, *supra*, at 14.

25. National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, sec. 1011, § 102A(a), 118 Stat. 3643, 3644 (codified at 50 U.S.C. § 403-1).

. conducted,”<sup>26</sup> and specifically requires disclosure of the legal basis for intelligence interrogations<sup>27</sup> and cybersecurity programs.<sup>28</sup>

With respect to covert actions, the 1980 statute modified the Hughes-Ryan Amendment’s requirement that the executive branch notify “the appropriate committees of the Congress,” (which by 1980 numbered eight)<sup>29</sup> so that such notice need be given only to the intelligence committees.<sup>30</sup> This modification significantly decreased the number of members of Congress to whom notice was given, assuaging the executive branch’s concern about the potential for leaks. It implicitly required intelligence agency heads to provide prior notification of such actions to the full intelligence committees,<sup>31</sup> but explicitly permitted prior notice to be limited to eight congressional intelligence leaders (the chairs and ranking members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate) “if the President determines it is

---

26. Intelligence Authorization Act for Fiscal Year 2010, Pub. L. No. 111-259, § 331(b), 124 Stat. 2654, 2685 (amending 50 U.S.C. § 413a(a)(2)).

27. *Id.* § 333(a)(3), 124 Stat. at 2687.

28. *Id.* § 336(a)(2)(A), 124 Stat. at 2689. This legislation also requires the executive branch to report the legal basis for covert actions. *See infra* text accompanying notes 83–86.

29. The eight committees previously subject to Hughes-Ryan notification were the House and Senate Committees on Intelligence, Armed Services, Foreign Affairs, and Appropriations. *See* James S. Van Wagenan, *A Review of Congressional Oversight: Critics and Defenders*, STUD. INTELLIGENCE, 1997, available at <http://www.cia.gov/library-center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/97unclass/wagenen.html>.

30. Intelligence Authorization Act for Fiscal Year 1981, Pub. L. No. 96-450, sec. 407, § 501(b), 94 Stat. 1975, 1982 (1980) (codified at 50 U.S.C. § 413 (1988)); SNIDER, *supra*, at 280–81.

31. The statute does not explicitly require the executive branch to provide the intelligence committees with prior notification of covert actions, but refers to covert actions as “significant *anticipated* intelligence activit[ies].” *Id.* § 407(a)(2), 94 Stat. at 1981 (emphasis added). The statute’s two mentions of “prior notice” seem to assume that prior notice is generally required. *See* 50 U.S.C. § 413(a)(1), (b) (1988) (amended 1991); *see also* S. REP. NO. 96-730, at 4 (1980) (repealing the Hughes-Ryan Amendment’s requirement that the executive branch report covert actions to Congress “in a timely fashion,” and replacing it with a requirement that the intelligence committees be given prior notice of covert actions); SNIDER, *supra*, at 59–60 (noting the statute “contemplated [the intelligence committees] would be advised in advance” of covert actions).



essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States.”<sup>32</sup> If the President had not provided *prior* notice, the statute required the President to “fully inform the intelligence committees *in a timely fashion*” about these actions and to “provide a statement of the reasons for not giving prior notice.”<sup>33</sup>

The limits of this approach and the issue of timing are illustrated by one aspect of Iran-Contra controversy. In January 1986, President Reagan issued presidential findings in connection with the sale of arms to Iran, but notified neither congressional intelligence leaders nor the full intelligence committees for more than ten months, until those operations were revealed in a Lebanese newspaper.<sup>34</sup> Eventually, the Justice Department’s Office of Legal Counsel (OLC) issued an opinion reviewing these events and asserting that this delay in notification was legal despite the statutory requirement that notice be given “in a timely fashion.”<sup>35</sup> The opinion reasoned that in light of the President’s constitutional authority as Commander in Chief, the vague “‘timely fashion’ language should be read to leave the President with virtually unfettered discretion to choose the right moment for making the required notification.”<sup>36</sup> In 1989 and 1990, congressional intelligence committees asked the first President Bush to repudiate the OLC opinion. President Bush responded by avoiding a direct confrontation with the intelligence committees, while at the same time not conceding any executive power. President Bush indicated that “in almost all instances,” he would provide prior notice; “in those rare instances” when he did not provide prior

---

32. 50 U.S.C. § 413(a)(1). The Senate Report accompanying this legislation asserted that withholding of prior notice to the full committees would occur “in rare extraordinary circumstances.” S. REP. NO. 96-730, at 12.

33. Intelligence Authorization Act for Fiscal Year 1981, sec 407(b)(1), § 501(b), 94 Stat. at 1982 (codified at 50 U.S.C. § 413(b)) (emphasis added).

34. See Marshall Silverberg, *The Separation of Powers and Control of the CIA’s Covert Operations*, 68 TEX. L. REV. 575, 603 (1990); see also EXECUTIVE SUMMARY, in REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

35. Memorandum from Charles J. Cooper, Assistant Attorney Gen., Office of Legal Counsel, Dep’t of Justice, to the Attorney Gen., The President’s Compliance with the “Timely Notification” Requirement of Section 501(b) of the National Security Act (Dec. 17, 1986) at 2, 24.

36. *Id.* at 24.

notice, he “anticipate[d] that notice will be provided within a few days”; and if he withheld notice for longer than that, he would be doing so “based upon [his] assertion of authorities granted [his] office by the Constitution.”<sup>37</sup> In effect, Bush asserted that the Constitution granted him authority to act contrary to the statutory requirement of “timely” notice.<sup>38</sup>

In 1991, following recommendations of the joint committee responsible for investigating the Iran-Contra scandal,<sup>39</sup> Congress enacted legislation stating that presidential findings in support of covert actions must be in writing, and must be provided to the chairs of the intelligence committees, and may not authorize covert actions that have already occurred.<sup>40</sup> In that legislation, Congress left the nonspecific “timely fashion” requirement, rather than replacing it with a more specific requirement.<sup>41</sup> The conference report accompanying this legislation asserted that reenactment of “the phrase ‘in a timely fashion’ . . . should not in any way be taken to imply agreement or acquiescence in the” OLC memorandum’s position, and that the phrase should properly be understood to mean “within a few days.”<sup>42</sup> The conference report, however, disclaimed any congressional ability to authoritatively interpret this law. It asserted that “[n]either the legislative [n]or executive branch authoritatively interpret the Constitution, which is the exclusive province of the judicial branch.”<sup>43</sup> Yet this assertion ignored the fact that the judicial branch never has the opportunity to interpret the Constitution

---

37. Letter from President George Bush, President of the United States, to the Chairman of the House Intelligence Comm., *reprinted in* H.R. REP. No. 102-166, at 27 (1991) (Conf. Rep.).

38. Under the analysis in Justice Jackson’s *Youngstown* concurrence, this would fall into Jackson’s third category: executive power that exists after Congress has legislated a prohibition. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring).

39. Conner, *supra*, at 35.

40. Intelligence Authorization Act, Fiscal Year 1991, Pub. L. No. 102-88, sec. 602, § 503(a), 105 Stat. 429, 442 (codified at 50 U.S.C. § 413b (2006)).

41. *Id.*

42. H.R. REP. No. 102-166, at 28 (“[T]he President’s stated intention . . . to make a notification ‘within a few days’ . . . is consistent with what the conferees believe is its meaning and intent.”).

43. *Id.*

regarding many issues related to intelligence. Oftentimes in the national security sphere, the responsibility of interpreting the Constitution falls on the political branches, rather than the judicial branch. Faced with a President who asserted constitutional authority to ignore a statutory requirement, Congress blinked when given the opportunity to devise a statutory mandate for “timely notification.”

The Intelligence Authorization Act for Fiscal Year 2010 tweaked covert action notifications in several ways.<sup>44</sup> Covert action notifications must now be in writing and must explain their legal basis.<sup>45</sup> When the notification is limited to congressional intelligence leaders, the executive branch must provide a written statement to those leaders explaining why it was necessary to limit notice in this way.<sup>46</sup> In addition, it must notify the remaining intelligence committee members that it issued a notification to committee leaders and provide “a general description . . . consistent with the reasons for not yet fully informing all members of [the] committee[s].”<sup>47</sup>

While some of Congress’s constraints on the executive branch include the potential for criminal liability,<sup>48</sup> there is no criminal liability for failure to notify Congress of intelligence activities. The executive branch may pay a political price for failing to notify Congress, however, depending on the political salience of the issue. This dynamic was illustrated in the spring of 1984, when news reports revealed that the CIA had engaged in a covert action to mine Nicaragua’s harbors. The leadership of the Senate Intelligence Committee asserted that the

---

44. Pub. L. No. 111-259, 124 Stat. 2654.

45. *Id.* § 331(c), 124 Stat. at 2685–86 (amending 50 U.S.C. § 413b(b)(2), (c)(1)).

46. *Id.* (to be codified at 50 U.S.C. § 413b(c)(5)(A)). Within 180 days, the President must either reveal the information to the entire committee or provide an explanation of why such access must be denied. *Id.*

47. *Id.* (to be codified at 50 U.S.C. § 413b(g)).

48. *E.g.*, 18 U.S.C. § 2441 (2006) (imposing domestic criminal liability for a grave breach of the Common Article 3 of the Geneva Conventions); 50 U.S.C. § 1809(a)(1) (a provision of the Foreign Intelligence Surveillance Act imposing criminal liability for “engag[ing] in electronic surveillance under color of law except as authorized” by statute); *see* JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION (2007) (criticizing the potential for criminal liability of executive branch officials).

administration had not informed the committee,<sup>49</sup> and the chair wrote a public letter excoriating the DCI for this failure.<sup>50</sup> Congress responded by cutting off financial support for the military aid to the Nicaraguan Contras.<sup>51</sup> More recently, the second Bush administration's failure to notify the full intelligence committees of its warrantless surveillance programs did not result in any legislative setbacks,<sup>52</sup> and the administration was eventually able to obtain statutory authorization for warrantless surveillance<sup>53</sup> and statutory immunity for telecommunication firms that had assisted the government in warrantless surveillance.<sup>54</sup>

While Congress has imposed statutory requirements that the executive branch provide it with information, these requirements are fundamentally ambiguous.<sup>55</sup> In effect, they leave the executive branch

---

49. Vice Chair Daniel Moynihan "said he first learned of the American role in the mining in an article in The Wall Street Journal." Bernard Gwertzman, *Moynihan to Quit Senate Panel Post in Dispute on C.I.A.*, N.Y. TIMES, Apr. 16, 1984, at A1.

50. *Goldwater Writes CIA Director Scorching Letter*, WASH. POST, Apr. 11, 1984, at A17 (reprinting Letter from Senator Barry Goldwater, Chairman, Senate Intelligence Comm., to William J. Casey, CIA Dir. (Apr. 9, 1984). At least one member of the committee disputed Goldwater's assertion, stating "Casey supplied 'all [the] sufficient details for anybody to draw correct conclusions.'" George J. Church, *Explosion over Nicaragua*, TIME, Apr. 23, 1984, at 18, 22 (quoting Senator Malcolm Wallop). Another member, Senator Leahy, said he had requested a separate briefing from the CIA and had asked specific questions about the mining operation. Gwertzman, *supra*; see Loch K. Johnson, *Ostriches, Cheerleaders, Skeptics, and Guardians: Role Selection by Congressional Intelligence Overseers*, 28 SAIS REV. INT'L AFF. 93, 102-03 (2008) (arguing Casey misled the Senate Intelligence Committee).

51. REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216 (1987).

52. Cynthia McKinney, a member of the House of Representatives who had lost her bid for reelection, introduced Articles of Impeachment against George W. Bush on December 8, 2006, but her bill did not attract any co-sponsors. H.R. Res. 1106, 109th Cong. (2006).

53. Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552.

54. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, sec. 201, §§ 801-804, 122 Stat. 2436, 2467-70.

55. For an example of this ambiguity, see THE SELECT COMM. ON INTELLIGENCE, U.S. SENATE, LEGISLATIVE OVERSIGHT OF INTELLIGENCE ACTIVITIES: THE U.S. EXPERIENCE, S. REP. NO. 103-88, at 10 (1994) (asserting that "the [intelligence] committees, as a matter of law and principle, recognize no limitation on their access to information," while in the next sentence acknowledging that "no law can readily compel full access to information if intelligence agencies are convinced that such access will

with the discretion to disclose or not. The consequences of nondisclosure are merely political rather than legal. Although the executive branch shares a wide range of intelligence information with Congress,<sup>56</sup> it also asserts its authority not to share some intelligence information.<sup>57</sup> The intelligence committees have “been willing to limit access to particularly sensitive information to members and/or a few senior staff, [and] to limit the number of committee members with access to especially sensitive information.”<sup>58</sup> Some of these limits—such as notifying only congressional intelligence leaders of covert actions—are statutorily authorized, but other limits—such as restrictions on consulting staff—have no statutory basis.<sup>59</sup>

### **B. Members’ Staff**

Members of Congress delegate to their staff members the initial fact-finding and analysis that result in hearings, reports, and ultimately, legislation. While members may provide the vision and goals for this work, their staff carry out essential functions in investigating the executive branch’s activities and enabling members to understand the legal framework in which those activities occur.

Just as members’ access to intelligence information increased in the mid-1970s, so too did access for their staffs. The subcommittees that conducted intelligence oversight until the mid-1970s had only minimal staff.<sup>118</sup> In the Senate, only one staff member was allowed to attend

---

result in catastrophic disclosures of information on their sensitive sources and methods”); see also Memorandum from Charles J. Cooper to the Attorney Gen., *supra*, at 2 (describing ambiguities in statutory requirement for timely notification).

56. In 2004, the CIA provided Congress with 1000 briefings and 4000 documents. ALFRED CUMMING, CONG. RESEARCH SERV., R40136, CONGRESS AS A CONSUMER OF INTELLIGENCE INFORMATION 7–8 n.40 (2009).

57. The executive branch does not generally share intelligence sources or methods, raw intelligence, or the President’s Daily Brief with Congress. *Id.* at 4.

58. S. REP. NO. 103-88, at 10.

59. Intelligence committee leaders have also acquiesced in the executive branch’s desire to limit some information to the committee chairs and ranking members. There is no statute, committee rule, or chamber rule support for these limited notifications ALFRED CUMMING, CONG. RESEARCH SERV., R40698, “GANG OF FOUR” CONGRESSIONAL INTELLIGENCE NOTIFICATIONS 6–7 (2010), at 6–7.

118. SNIDER, THE AGENCY AND THE HILL, *supra* at 306.

briefings conducted by intelligence agencies.<sup>119</sup> The subcommittees did not have secure facilities to store classified documents, so they did not keep written records of the executive branch's briefings or of subcommittee meetings. Staff members who wanted to examine documents had to travel to Central Intelligence Agency (CIA) headquarters in Langley, Virginia, and were prohibited from removing any documents or even their own notes about the documents.<sup>120</sup>

The Church and Pike Committees, on the other hand, had large staffs who underwent security background checks so that they could gain access to intelligence information.<sup>121</sup> These security-cleared staff members' enabled the Church and Pike Committees to conduct extensive hearings and produce lengthy reports about intelligence abuses. The National Security Agency (NSA) initially took the position that its information was so sensitive that it would be provided only to the chair and ranking member, rather than to staffers, but it eventually abandoned this position and provided information to committee staffers.<sup>122</sup> Staffers were instrumental in uncovering the NSA's program of warrantless surveillance of telegram traffic in and out of the country.<sup>123</sup>

Since enactment of the congressional intelligence leader notification procedures in 1980, the executive branch has asserted that those leaders may not consult their staff members—even those with high-level security clearances—regarding the covert action information that the executive

---

119. CRABB & HOLT, *supra*, at 141.

120. SMIST, *supra*, at 4–5, 7–8.

121. The Church Committee had 135 staff members, LOCH K. JOHNSON, A SEASON OF INQUIRY: THE SENATE INTELLIGENCE INVESTIGATION 25 (1985), and the Pike Committee had 32 staff members. SMIST, *supra*, at 136.

122. L. Britt Snider, *Recollections from the Church Committee's Investigation of NSA: Unlucky SHAMROCK*, STUD. INTELLIGENCE, Winter 1999–2000, available at <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/winter99-00/art4.html>. The NSA initially indicated that the answers to the committee's written interrogatories were so sensitive that they would be provided only to the chair and ranking member. After a news leak regarding the NSA's surveillance of international communications, however, the NSA wanted to get out "its side of the story," and it briefed Church Committee staff on this surveillance. *Id.*

123. *Id.*

branch provides them.<sup>124</sup> Congressional intelligence leaders have also acquiesced to the executive branch position on this issue. The intelligence oversight statutes are silent on this question, as are the intelligence committee rules.

While intelligence committee members are able to consult their staff regarding many intelligence activities, they have not been able to do so with respect to some of the most sensitive intelligence programs. This hobbles Congress's ability to understand and analyze key executive branch programs. Executive branch officials have asserted that these programs—such as warrantless surveillance—are legal, but they have not permitted Congress to review the executive branch's own legal analysis.<sup>125</sup> In addition, the executive branch asserts that these members may not consult their own security-cleared lawyers and other expert staff, which would enable these members to draw their own independent conclusions about the legality of these programs.<sup>126</sup>

Executive branch insistence that Congress not consult its staff has occurred not just in connection with congressional oversight of intelligence activities, but also with respect to congressional authorization for war. In the fall of 2002, the Bush administration was seeking congressional authorization for its planned invasion of Iraq. The executive branch made available to all members of Congress—but not their staffs—a ninety-two page document assessing Iraq's weapons of mass destruction.<sup>127</sup> All members of Congress were free to go to a secure room and read the document, but they could not take notes and could not consult staff about its contents.<sup>128</sup> Prior to voting to authorize the U.S.

---

124. Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1059 (2008).

125. See, e.g., Letter from William E. Moschella, Assistant Attorney Gen., to Senator Patrick J. Leahy, Ranking Member, Comm. on the Judiciary (Apr. 4, 2005) (on file with author) (“[T]he Executive Branch has substantial confidentiality interests in OLC opinions, and our longstanding practice is not to disclose non-public OLC opinions outside the Executive Branch.”).

126. See Kitrosser, *supra*, at 1059.

127. Dana Priest, *Congressional Oversight of Intelligence Criticized: Committee Members, Others Cite Lack of Attention to Reports on Iraqi Arms, Al Qaeda Threat*, WASH. POST, Apr. 27, 2004, at A1.

128. *Id.*

invasion of Iraq, only a few members of Congress took the time to read past the five-page executive summary.<sup>129</sup>

### **C. Congress's Indirect Servants: Government Accountability Office and Inspectors General**

In monitoring the activities of the executive branch, Congress relies not just on its own staffers, but also on other offices that it has created in the legislative and executive branches. These include the Government Accountability Office (GAO) and offices of Inspector General (IG) in dozens of executive branch agencies.

The GAO has over 3000 employees who audit and analyze the operation of the executive branch, responding to specific requests for such analysis from members of Congress.<sup>151</sup> GAO employees engage in long-term—if often low-profile—investigations and analyses of executive branch programs, producing hundreds of detailed and often technical reports every year.<sup>152</sup> The GAO helps Congress carry out its oversight functions by conducting long-term studies and developing expertise regarding executive branch programs. Despite -- or perhaps because of -- this record of robust, staff-enabled oversight, the executive branch has traditionally insisted that Congress not consult the GAO in connection with certain intelligence information. The executive branch asserts that the GAO lacks the authority to analyze intelligence activities.<sup>153</sup> During the Reagan administration, the DOJ's OLC asserted that while the GAO's mandate is to evaluate executive branch programs that have been authorized by statute, intelligence activities are undertaken pursuant to the President's constitutional foreign policy

---

129. *Id.*; see also Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 450–51 (2010).

151. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-2SP, CITIZENS' REPORT: FISCAL YEAR 2008 SUMMARY OF GAO'S PERFORMANCE AND FINANCIAL RESULTS 1 (2009), <http://www.gao.gov/new.items/d092sp.pdf>.

152. In Fiscal Year 2008, the GAO provided Congress with over 1200 reports (including written testimony) analyzing executive branch programs. *Id.* at 3.

153. Investigative Authority of the General Accounting Office, 12 Op. O.L.C. 171 (1988).



responsibilities rather than statute.<sup>154</sup> In light of the statutory authorization for and regulation of intelligence operations, this OLC opinion is not particularly persuasive. Until recently, Congress has acquiesced in the executive branch's insistence that intelligence oversight be conducted only by the intelligence committees and not by the GAO. But legislative developments in 2010 suggest that this may be changing, at least to a limited degree. The Intelligence Authorization Act for Fiscal Year 2010 required the DNI to "issue a written directive governing the access of the Comptroller General," who is the leader of the GAO, to intelligence information,<sup>155</sup> and required the Comptroller General to ensure the confidentiality of that information.<sup>156</sup>

Another less direct agent of Congress exists in the offices of Inspector General (IG) that Congress has created in dozens of agencies.<sup>157</sup> Congress gave IGs the ability to directly access an agency's records in order to investigate allegations of waste, fraud, and abuse. They generally have independence in how they conduct their work,<sup>158</sup> but on occasion, Congress has responded to specific allegations of wrongdoing by requiring IGs to investigate and report on the allegations.<sup>159</sup> The President can remove an IG without cause, but must

---

154. *Id.* at 172 ("[GAO's statutory mandate covers] only . . . activities carried out pursuant to statute, and not activities carried out pursuant to the Executive's discharge of its own constitutional responsibilities.").

155. Pub. L. No. 111-259, § 348(a)(1), 124 Stat. 2654, 2700 (to be codified at 50 U.S.C. § 403-9).

156. *Id.* § 348(b)(1), 124 Stat. at 2700. The legislation also indicates that GAO employees will be subject to "the same statutory penalties for unauthorized disclosure or use of such information as" executive branch employees. § 348(b)(2), 124 Stat. at 2700.

<sup>157</sup> Inspector General Act of 1978, Pub. L. No. 95-452, § 6, 92 Stat. 1101, 1104-05 (codified at 5 U.S.C. app. 3 § 6 (2006)); *but see id.* §§ 8D, 8E (permitting Treasury Secretary and Attorney General to restrict IGs' access to information relating to ongoing investigations, confidential sources, and other matters).

<sup>158</sup> The heads of seven departments (Defense, Homeland Security, Justice, Treasury, CIA, the Federal Reserve and the U.S. Postal Service) can prevent their Inspector General from pursuing an investigation in order to protect an ongoing criminal investigation or national security, but must report to the Congressional Committees. FREDERICK M. KAISER & WALTER J. OLESZEK, CONGRESSIONAL OVERSIGHT MANUAL at CRS-94 (May 1, 2007), available at <http://www.fas.org/sgp/crs/misc/RL30240.pdf>.

<sup>159</sup> *See, e.g.*, USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006).

inform Congress of the reasons for removal.<sup>160</sup> IGs' direct access to agency documents gives them the ability to provide intensive oversight in response to specific allegations.<sup>161</sup> While IGs are embedded within the executive branch and are appointed by the President or agency head, they may be thought of as servants of Congress, gathering information about alleged wrongdoing within the executive branch and providing that information to Congress on a regular basis.

Every six months, IGs issue detailed reports to the agency head and Congress.<sup>162</sup> When IGs discover "particularly serious or flagrant problems" within the agency, they must report immediately to the agency head, who must forward that report to Congress.<sup>163</sup> IG reports have become a particularly important source of information for congressional committees investigating the executive branch.<sup>164</sup> IGs can recommend sanctions against particular employees and changes in administrative processes, but cannot impose either.<sup>165</sup> On the other hand, the publicity that accompanies the issuance of an IG report sometimes spurs political pressure for changes in such processes.<sup>166</sup> For example, after concerns were raised about the FBI's extensive use of National Security Letters

---

<sup>160</sup> Inspector General Act, §§ 3(b), 8G(e). President Reagan's second act as president was his decision to remove all of the Inspectors General who had been appointed by President Carter. PAUL C. LIGHT, *MONITORING GOVERNMENT: INSPECTORS GENERAL AND THE SEARCH FOR ACCOUNTABILITY* 102 (1993).

<sup>161</sup> See, e.g., UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM PREPARED BY THE OFFICES OF INSPECTORS GENERAL OF THE DEPARTMENT OF DEFENSE, DEPARTMENT OF JUSTICE, CENTRAL INTELLIGENCE AGENCY, NATIONAL SECURITY AGENCY AND DIRECTOR OF NATIONAL INTELLIGENCE (2009).

<sup>162</sup> *Id.* at § 5.

<sup>163</sup> *Id.* at § 5(d).

<sup>164</sup> LIGHT, *supra* at 39, 56 (1993) (quoting "a key legislative player" as stating that "IGs gave us . . . someone who would give us regular input through the semi-annual reports and irregular access [to information] through the development of good working relationships").

<sup>165</sup> For example, during the Reagan administration, the IG at the Department of Housing and Urban Development (HUD) discovered serious problems with the operation of a program related to Section 8 housing, and recommended suspending that program. HUD Secretary Samuel Pierce refused to suspend the program, which spawned a massive scandal and Independent Counsel investigation of criminal wrongdoing. LIGHT, *supra* at 69.

<sup>166</sup> In addition, something akin to rectification occurs when the agency adopts the IG's recommendations.

(NSLs) to collect information, Congress required the Justice Department IG to audit the FBI's use of NSLs.<sup>167</sup> Those audits revealed widespread problems in the FBI's administration of NSLs,<sup>168</sup> and helped spur legislation cutting back on the FBI's authority to issue them.<sup>169</sup>

## II. Canadian Parliament's Access to Intelligence Information

Canada has three main agencies that engage in intelligence activities: the Canadian Security Intelligence Service (CSIS), the Communications Security Establishment (CSE) and the Royal Canadian Mounted Police (RCMP). CSIS provides security assessments to all federal departments and agencies except the RCMP.<sup>185</sup> CSE provides "foreign signals intelligence in support of defence and foreign policy" and protects electronic information and communication.<sup>186</sup> The RCMP, which is Canada's federal police force, dramatically increased its role in intelligence after the Canadian Parliament passed the post- 9/11 Anti-Terrorism Act, which criminalized terrorist support, terrorist financing and participation in terrorist groups.<sup>187</sup>

This section describes parliamentarians' direct and indirect access to intelligence information. Traditionally, members of Parliament have not had access to classified information. Instead, they have had access only

---

<sup>167</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119, 120 Stat. 192, 219 (2006).

<sup>168</sup> U.S. DEPT. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), *available at* <http://www.justice.gov/oig/special/s0703b/final.pdf>; U.S. DEPT. OF JUSTICE, OFFICE OF INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (2008), *available at* <http://www.justice.gov/oig/special/s0803b/final.pdf>.

<sup>169</sup> After the first Inspector General report, Representative Jerrold Nadler introduced a bill to place limits on the use of National Security Letters on July 26, 2007, H.R. 3189, 110th Cong. (2007), and Senator Russ Feingold introduced a companion bill in the Senate on Sept. 25, 2007. S. 2088, 110th Cong. (2007).

<sup>185</sup> SECURITY INTELLIGENCE REVIEW COMMITTEE, ANNUAL REPORT TO THE HOUSE OF COMMONS, 2009-2010 (available at [http://www.sirc-csars.gc.ca/pdfs/ar\\_2009-2010-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2009-2010-eng.pdf)).

<sup>186</sup> National Defence Act, R.S.C. 1985, s. 273.62.

<sup>187</sup> S.C. 2001, c. 41; TIM RIORDAN RAAFLAUB, CIVILIAN OVERSIGHT OF THE RCMP'S NATIONAL SECURITY FUNCTION (2006) (available at <http://www.parl.gc.ca/content/LOP/ResearchPublications/prb0409-e.htm>).

to unclassified information that is made public by the offices that conduct reviews of intelligence agencies and by ad hoc inquiries that the Canadian government establishes in response to specific scandals.

#### A. Parliamentary Members and Offices

Members of the Canadian Parliament – other than those who are government ministers – have generally not had direct access to classified security information. Both the House of Commons and the Senate have committees that review national security affairs, but the members of those committees do not have access to classified information about intelligence activities.<sup>188</sup> The House of Commons has a Standing Committee on Public Safety and National Security, whose mandate is to review the effectiveness of the CSIS and RCMP.<sup>189</sup> The committee can compel the appearance of officials, including ministers, and its members are regularly briefed on national security issues.<sup>190</sup> While the Committee could potentially be a potent review body, its members do not have access to intelligence information.<sup>194</sup> Similarly, the Senate has a Special Committee on Anti-Terrorism, but like its House counterpart, its members do not have access to classified information.<sup>195</sup> As a result, committee review of intelligence programs has been described as “perfunctory.”<sup>196</sup>

The Parliamentary officer responsible for auditing federal government programs, the Auditor General, has asked the key question: “How can Parliament scrutinize the spending and performance of security and intelligence activities if key information must be kept secret” from Parliament?<sup>197</sup> She has noted the contrast between Parliament’s

---

<sup>188</sup> CRAIG FORCESE, NATIONAL SECURITY LAW: CANADIAN PRACTICE IN INTERNATIONAL PERSPECTIVE 109 (2008); SPECIAL SENATE COMMITTEE ON ANTI-TERRORISM, SECURITY, FREEDOM AND THE COMPLEX TERRORIST THREAT: POSITIVE STEPS AHEAD 42 (2011) (hereinafter SPECIAL SENATE COMMITTEE, POSITIVE STEPS AHEAD).

<sup>189</sup> Standing Order, s.108(2), Available at <http://www.parl.gc.ca/About/House/StandingOrders/chap13-e.htm>

<sup>190</sup> FORCESE, *supra* at 109.

<sup>194</sup> SPECIAL SENATE COMMITTEE, POSITIVE STEPS AHEAD, *supra* 45-46.

<sup>195</sup> *Id.*

<sup>196</sup> FORCESE, *supra* at 109 (describing Standing Committee on Public Safety and National Security).

<sup>197</sup> *Id.*

legislative authority to control and review intelligence agencies and the inability of Parliamentarians to carry out these functions.<sup>198</sup> She has noted that while “parliament needs objective information to determine whether public funds have been spent properly and managed well,” the need for secrecy “create[s] special problems for . . . providing information to Parliament.”<sup>199</sup> An ad hoc committee of Parliamentarians has recommended the creation of a parliamentary committee to conduct reviews of the security and intelligence communities, but Parliament has failed to pass legislation that would create a permanent National Security Committee of Parliamentarians to provide oversight for the intelligence agencies.<sup>200</sup>

Against this background of no permanent parliamentary access to intelligence information, in 2009, the House of Commons responded to an intelligence-related scandal regarding the alleged mistreatment of detainees by Canadian forces in Afghanistan by creating a Special Committee to conduct an investigation, and that Committee demanded that the government produce documents.<sup>201</sup> After the government resisted and asserted national security secrecy, the Speaker of the House of Commons ruled that the government must turn over the information, asserting that the House of Commons has a fundamental right to hold the Government to account for its actions.<sup>202</sup> The Speaker found that

---

<sup>198</sup> AUDITOR GENERAL OF CANADA, A MESSAGE FROM THE AUDITOR GENERAL OF CANADA 1 (April 2005) (hereinafter 2005 AUDITOR GENERAL MESSAGE), available at [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200504\\_00\\_e\\_14931.html](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200504_00_e_14931.html) (last visited August 9, 2012).

<sup>199</sup> 2005 AUDITOR GENERAL MESSAGE, *supra* at 1.

<sup>200</sup> Bill C-81, is available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=2333974&Language=E&Mode=1&File=14>.

The Auditor General also recommended creating “a committee of Parliament, bound to secrecy and acting on behalf of the whole, that could receive reports containing classified information from security and intelligence agencies.” 2005 AUDITOR GENERAL MESSAGE at 2.

<sup>201</sup> Craig Forcese, *Parliamentary and Specialised Oversight of Security and Intelligence Agencies in Canada*, in EUROPEAN PARLIAMENT DIRECTORATE-GENERAL FOR INTERNAL POLICIES, PARLIAMENTARY OVERSIGHT OF SECURITY AND INTELLIGENCE AGENCIES IN THE EUROPEAN UNION (Annex A.XI) (2011).

<sup>202</sup> Ruling on the Questions of Privilege Raised on March 18, 2010 Concerning the Order of the House of December 10, 2009, Respecting the Production of Afghan Detainee Documents (available at <http://www.canada.com/pdf/lee-ruling-2010-04-27-english.pdf>).

“accepting an unconditional authority of the executive to censor the information provided to Parliament would jeopardize the separation of powers.”<sup>203</sup> Eventually, the government agreed to a procedure involving the appointment of an Ad Hoc Committee of Parliamentarians who would obtain security clearances and take a confidentiality oath.<sup>204</sup> In 2011, this Committee received the first set of requested documents, which was the first time that members of Parliament had been provided with classified information.<sup>205</sup>

While members of Parliament have not generally had direct access to classified information, a parliamentary officer, the Auditor General, has had such access. The Auditor General audits federal government departments, Crown corporations, and other federal organizations, reporting publicly to the House of Commons on matters that the Auditor General believes should be brought to its attention. The Auditor General can require the federal government to provide all information that she considers necessary to fulfill her responsibilities.<sup>208</sup> But when the Auditor General reports to Parliament, her reports do not include classified information.

As the next section shows, members of Parliament and of the public have had access to some information about Canadian intelligence activities through the publicly available reports of several government offices that review the intelligence-related agencies.

### **B. Non-Parliamentary Offices that Review Intelligence Activities**

Each of the three main agencies that engage in intelligence activities has an office responsible for reviewing those activities. The activities of the CSIS are reviewed by the Security Intelligence Review Committee

---

<sup>203</sup> *Id.*

<sup>204</sup> Memorandum of Understanding between the Right Honourable Stephen Harper, Prime Minister, The Honourable Michael Ignatieff, Leader of the Official Opposition and Gilles Duceppe, Leader of the Bloc Quebecois, June 2010 (available at [www.scribd.com/doc/33138988/Final-agreement-to-release-detainee-related-documents](http://www.scribd.com/doc/33138988/Final-agreement-to-release-detainee-related-documents)).

<sup>205</sup> Mark Kennedy and Althia Raj, *Government Releases Afghan Detainee Documents*, NATL. POST (June 22, 2011); THE HONOURABLE CLAIRE L'HEUREUX-DUBÉ AND THE HONOURABLE FRANK IACOBUCCI, *AFGHAN DETAINEE DOCUMENT REVIEW: REPORT BY THE PANEL OF ARBITERS ON ITS WORK AND METHODOLOGY FOR DETERMINING WHAT REDACTED INFORMATION CAN BE DISCLOSED* (April 15, 2011).

<sup>208</sup> *Id.*

(SIRC) and an Inspector General (IG). The RCMP is reviewed by the Commission for Public Complaints Against the RCMP (CPC). The CSE is reviewed by the Office of the Communications Security Establishment Commissioner. In general, these executive review offices have access to classified information, but all references to classified information are removed before their reports are provided to Parliament.

### **(1) SIRC and IG Review of the CSIS**

CSIS is subject to an independent review body, the Security Intelligence Review Committee (SIRC) that investigates complaints, conducts reviews of CSIS's activities and reports to the Canadian Parliament.<sup>223</sup> SIRC's members are appointed from the Queen's Privy Council.<sup>224</sup> SIRC has full access to any information under the control of CSIS, except confidences of the Queen's Privy Council.<sup>225</sup> SIRC is small in size relative to CSIS, and operates on the basis of risk management. It develops a plan to review particular programs, and a typical review requires hundreds of staff hours over the course of several months. The results of these staff reviews are then presented to the SIRC members. Most of SIRC's reports and recommendations are submitted to the director of CSIS rather than to Parliament, but once a year, SIRC produces an annual report on its activities and that report is submitted to both CSIS and Parliament.<sup>226</sup> That annual report

---

<sup>223</sup> Security Intelligence Review Committee annual report to the house of Commons, 2009-2010; available at [http://www.sirc-csars.gc.ca/pdfs/ar\\_2009-2010-eng.pdf](http://www.sirc-csars.gc.ca/pdfs/ar_2009-2010-eng.pdf)

<sup>224</sup> The Queen's Privy Council for Canada is the group of cabinet ministers, former cabinet ministers and other prominent Canadians appointed to advise the Queen on issues of importance to the country. The Governor General appoints each privy councillor on the advice of the Prime Minister. Membership is for life, unless the Governor General withdraws the appointment – again on the Prime Minister's advice. <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=council-conseil&doc=description-eng.htm>.

The Council General appoints the members of SIRC from among those members of the Queen's Privy Council who are not members of the Senate or the House of Commons. The Council General appoints them after consultation with the Prime Minister, the Leader of the Opposition in the House, and the leader of each party having at least twelve members in the House of Commons. CSIS Act.

<sup>225</sup> CSIS Act, s. 39 (3);

<sup>226</sup> CSIS Act, s. 52, 54;

summarizes its reports and recommendations, but all references to classified information are removed before it is provided to Parliament.<sup>227</sup>

CSIS is also subject to oversight by an Inspector General (IG) who is appointed by the Governor General<sup>232</sup> and answers to a deputy minister.<sup>233</sup> The IG reviews the operational activities of CSIS, monitoring whether it is in compliance with its operational policies<sup>234</sup> and certifying whether activities involved an unreasonable or unnecessary exercise of any of its powers.<sup>235</sup> It serves as “the Minister’s eyes and ears in the [CSIS] ... and to maintain an appropriate degree of ministerial responsibility.”<sup>236</sup> The IG has access to any information relating to CSIS’s performance of its functions<sup>237</sup> except confidences of the Queen’s Privy Council<sup>238</sup> and Cabinet documents.<sup>239</sup> The IG reports

---

<sup>227</sup> The annual reports to the Parliament are available at <http://www.sirc-csars.gc.ca/anrran/index-eng.html>

<sup>232</sup> The governor in Council, referred as Governor General, represents the Queen in Canada and exercises powers and responsibilities belonging to the Sovereign, with the advice of members of the Privy Council. The governor general is also the commander-in-chief of Canada. The governor general presides over the swearing-in of the prime minister, the chief justice of Canada and cabinet ministers. It is the governor general who summons, prorogues and dissolves Parliament, delivers the Speech from the Throne, and gives Royal Assent to acts of Parliament. The governor general signs official documents and regularly meets with the prime minister. The governor general is non-partisan and non-political. Information available at <http://www.gg.ca/document.aspx?id=3>

<sup>233</sup> Canadian Security Intelligence Service Act, R.S.C., 1985, c. C-23, s. 30; available at <http://laws-lois.justice.gc.ca/eng/acts/C-23/index.html>

<sup>234</sup> CSIS Act, s. 30;

<sup>235</sup> *Id.* s. 33;

<sup>236</sup> RAAFLAUB, *supra*.

<sup>237</sup> CSIS Act, s. 31 (1);

<sup>238</sup> *CSIS act*, s. 31 (2). According to the Canada Evidence Act, “a confidence of the Queen’s Privy Council for Canada” includes information contained in

- (a) a memorandum the purpose of which is to present proposals or recommendations to Council;
- (b) a discussion paper the purpose of which is to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions;
- (c) an agendum of Council or a record recording deliberations or decisions of Council;
- (d) a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;



to the Minister of Public Safety, and those reports may contain classified information. Those reports are made public only after the classified information is removed from the report.<sup>240</sup>

To summarize, SIRC has authority to review the activities of the CSIS, but all classified information is removed from its reports before they are provided to Parliament. The IG has access to extensive information about the CSIS, but it reports to the Minister rather than to Parliament. All classified information is removed from these reports before they are made public and provided to Parliament.

### **(2) Commissioner Review of the CSE**

The review body for the CSE is the Office of the Communications Security Establishment Commissioner, who is appointed by the Governor General.<sup>250</sup> The Commissioner has access to all of CSE's information and reviews CSE's activities for compliance with the law.<sup>251</sup> He reports annually to the Minister regarding these reviews and the Minister forwards the annual report to both houses of Parliament, but the annual report is not made public.<sup>252</sup> He also has the power to undertake investigations in response to complaints, and must report to the Minister and (if appropriate) the Attorney General any illegal activity.<sup>253</sup>

### **(3) CPC Review of RCMP**

- 
- (e) a record the purpose of which is to brief Ministers of the Crown in relation to matters that are brought before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d); and
  - (f) draft legislation.

“Council” means the Queen’s Privy Council for Canada, committees of the Queen’s Privy Council for Canada, Cabinet and committees of Cabinet; Canada Evidence Act, s. 39 (2) (3), available at <http://laws-lois.justice.gc.ca/PDF/C-5.pdf>

<sup>239</sup> *CSIS act*, s. 31 (2);

<sup>240</sup> The annual certificates of IG to the minister, classified information removed, are available at <http://www.publicsafety.gc.ca/abt/www/igcsis/igcsis-eng.aspx>

<sup>250</sup> National Defence Act, s. 273.63 (1).

<sup>251</sup> COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MEHER ARAR, ANALYSIS AND RECOMMENDATIONS 283 (2006) (hereinafter ARAR INQUIRY)

<sup>252</sup> *Id.* at 282.

<sup>253</sup> National Defence Act, s. 273. 63 (2).

The review body for the RCMP is the Commission for Public Complaints Against the RCMP (CPC). CPC members are appointed by the Governor General,<sup>255</sup> and the CPC reports to the Minister of Public Safety and Emergency Preparedness, who then forwards those reports to each House of Parliament.<sup>256</sup> The CPC has the authority to review RCMP behavior in individual cases,<sup>257</sup> but its review powers are quite limited in scope.<sup>258</sup> Its role is to respond to specific complaints from the public, and it rarely initiates investigations itself.<sup>259</sup> It has access only to information that is relevant to a specific complaint (unlike SIRC's broader access to CSIS's information).<sup>260</sup> Shirley Heafey, former CPC Chair, has publicly complained about its inability to carry out the proper review of RCMP's work and called for new powers so that the CPC can review the RCMP's anti-terrorism activities more effectively.<sup>261</sup>

While the RCMP's intelligence activities increased dramatically after adoption of the Anti-terrorism Act, the role of the RCMP's review body, the CPC, has not changed. The CPC's ability to provide accountability is quite limited. This has created a disparity between the review mechanisms for CSIS and those for the RCMP, with the RCMP being subject to less rigorous scrutiny.<sup>263</sup>

### C. Ad hoc Inquiries regarding Intelligence Abuses

While neither the Canadian Parliament nor the specific review offices engage in robust oversight of intelligence activities, the Canadian government does have an additional oversight mechanism that has

---

<sup>255</sup> RCMP Act, s. 45.29(1).

<sup>256</sup> *Id.* s. 45.34.

<sup>257</sup> Exhibit 1.1, AUDITOR GENERAL OF CANADA, MARCH 2009 STATUS REPORT, Chapter 1, *National Security: Intelligence and Information Sharing*, available at [http://www.oag-bvg.gc.ca/internet/English/parl\\_oag\\_200903\\_01\\_e\\_32288.html#hd3a](http://www.oag-bvg.gc.ca/internet/English/parl_oag_200903_01_e_32288.html#hd3a)

<sup>258</sup> RAAFLAUB, *supra*.

<sup>259</sup> CRMP Act, s. 45.37 (1). The RCMP is not obligated to follow recommendations made by the Chair or by a public interest hearing panel.

<sup>260</sup> RAAFLAUB, *supra*.

<sup>261</sup> *The Thin Line of Oversight*, THE GLOBE AND MAIL (December 14, 2009) <http://circ.jmellon.com/docs/view.asp?id=1256> (last visited August 11, 2011); Jim Bronskill, *Arar Inquiry Urges More Scrutiny of Canada's Intelligence Activities*, THE CANADIAN PRESS, 12 December, 2007, <http://circ.jmellon.com/docs/view.asp?id=1068> (last visited August 11, 2011).

<sup>263</sup> RAAFLAUB, *supra*.

produced significant information: ad hoc inquiries led by judges with the power to compel both testimony and the production of evidence.<sup>270</sup> Since 2001, two of these inquiries have investigated alleged misconduct by intelligence agencies and produced important reports that have been available to Parliament as well as the public. A 2006 inquiry report concluded that the RCMP provided misleading information about Canadian citizen Maher Arar to the United States government, which sent Arar to Syria, where he was tortured.<sup>271</sup> Similarly, a 2008 inquiry examined the role of Canadian government officials in the detention and torture of three Canadian citizens, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, by Syria and Egypt, and concluded that the actions of Canadian officials contributed to their detention or mistreatment.<sup>272</sup> Both inquiries discussed the lack of oversight of national security activities.<sup>304</sup> While the inquiries uncovered problems with the intelligence agencies, they did not result in any changes in parliamentary oversight for these agencies.

### Conclusion

The United States Congress has adopted a multi-channel approach to intelligence oversight. Members of Congress have access to classified information about intelligence activities both directly and indirectly. The executive branch shares some of its most sensitive information directly with only a few members of Congress. While this kind of direct access to information might seem ideal, other demands on members' time and restrictions on consulting staff regarding some of this information may actually hobble their ability to process and respond to this information. Members of Congress also gain access to a wider range of intelligence information indirectly through their staff members and

---

<sup>270</sup> See Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 CARDOZO L. REV. 53 (2007); Kent Roach, *Uneasy Neighbors: Comparative American and Canadian Counter-Terrorism*, 38 WM. MITCHELL L. REV. 1701 (2012).

<sup>271</sup> ARAR INQUIRY, *supra*, at 13-16 (2006).

<sup>272</sup> INTERNAL INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN (2008).

<sup>304</sup> STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY, REVIEW OF THE FINDINGS AND RECOMMENDATIONS ARISING FROM THE IACOBUCCI AND O'CONNOR INQUIRIES, 40<sup>th</sup> Parliament, 2nd session, 1 (2009) (available at [http://dsp-psd.pwgsc.gc.ca/collection\\_2009/parl/XC76-402-1-1-03E.pdf](http://dsp-psd.pwgsc.gc.ca/collection_2009/parl/XC76-402-1-1-03E.pdf))

review offices found in the legislative branch (the Government Accountability Office) and the executive branch (Inspectors General) that report to Congress. This indirect access to information has proven to be critically important to Congress's ability to conduct oversight because staff members and oversight agencies become force multipliers, enabling members of Congress to more effectively monitor and control executive branch intelligence activities.

Members of the Canadian Parliament have traditionally not had access to any classified information about the nation's intelligence activities. While one parliamentary office, the Auditor General, has access to classified information, her reports to Parliament are stripped of such information. Similarly, several non-parliamentary review offices have access to classified information, but their reports to Parliament do not include any classified information. Thus, members of Parliament are in no better position than a member of the public to evaluate the conduct of Canadian intelligence agencies. In a recent break with this approach, the House of Commons demanded and a few members were eventually given access to classified information about alleged wrongdoing regarding the Canadian forces' treatment of detainees in Afghanistan. The Memorandum of Understanding between the Prime Minister and leaders of three parliamentary parties that formed the basis for this information-sharing was unprecedented. But it was also an ad hoc response to a specific demand for information, and it is not clear whether it will become a precedent for future information sharing with Parliament.